Supreme Court, U.S.
FILED
NOV 30 1993
OFFICE OF THE CLERK

No. 93-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF PALO ALTO, *et al.*,
Petitioners,

v.

HAZEL R. O'LEARY, SECRETARY OF ENERGY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF OF PETITIONERS TO THE BRIEF IN OPPOSITION OF THE FEDERAL RESPONDENTS

REUBEN GOLDBERG*
CHANNING D. STROTHER, JR.
GOLDBERG, FIELDMAN & LETHAM, P.C.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone (202) 463-8300

ARIEL PIERRE CALONNE
City Attorney
City of Palo Alto
250 Hamilton Avenue
Palo Alto, CA 94301
Telephone (415) 329-2171

Attorneys for Petitioners Palo Alto, Roseville, Redding Biggs, Gridley and Plumas Sierra Rural Electric Cooperative

**Counsel of Record*

MICHAEL F. DEAN
City Attorney
City of Roseville
311 Vernon Street
Roseville, CA 95678
Telephone (916) 781-0325

Attorney for Petitioner City of Roseville

RANDALL A. HAYS
City Attorney
City of Redding
760 Parkview Avenue
Redding, CA 96001-3396
Telephone (916) 225-4050

Attorney for Petitioner City of Redding

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
REASONS FOR GRANTING THE WRIT	1
ARGUMENT	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Anderson v. Bessemer City, 470 U.S. 564, 84 L.Ed.2d 518 (1985) 2

Santa Clara v. Andrus, 572 F.2d 660 (9th Cir. 1978) 4,10

Federal Rules of Civil Procedure:

Rule 52(a) ..... *passim*

REPLY BRIEF OF PETITIONERS TO THE BRIEF IN OPPOSITION OF THE FEDERAL RESPONDENTS

REASONS FOR GRANTING THE WRIT

This is an important case, worthy of the Supreme Court's attention on certiorari, not only because of its general application to appellate review of district court contract interpretations but also because the appellate court violated Rule 52(a) and in the process misinterpreted the 1967 amendments to Petitioners' contracts. Additionally, the appellate court's decision not only adversely affects the Petitioners and their consumers of electric energy but also adversely affects every preference customer's contract with the Western Area Power Administration ("Western"). The appellate court ruled that Western's "legal ability" to sell power is limited by statutory necessity of providing power for project use and the first preference of three Counties[1] consequently, "the MOU . . . accommodate[s] that reality" (Br. 7, 11, n. 10). This ruling, is argued to be "an independent basis" for the appellate court's holding that "the MOU incorporated the two stated purposes that have statutory underpinnings" (Br. 11, n. 10).[2] The effect of the appellate court's finding is to declare unlawful each and every preference customer's power contract because all of the contracts exempt some or all of the allocation from withdrawals (RT 288, 292, 7/24/90; P.Ex. 26, Vols. I and II). Thus, it is of

---

[1] By statute (Pet. App. 31a and 33a) these counties have a preference of up to 25 percent of the power generated by certain plants. By statute the only power that Western may sell to preference customers is power surplus to project use.

[2] The Federal Respondents make this argument although they concede the appellate court's determination is devoid of any supporting reasoning. They offer as a substitute their views as the underpinnings for the appellate court's bare conclusion. That does not alter the fact that the appellate court's determination is unsupported. Petitioners' showed (Pet. 25-26) that the appellate court's determination of "statutory limitation" on Western authority to exempt allocations from withdrawal was flatly rejected by Western's witness Magaw (RT 181-182, 7/23/90). Nothing in the statutes cited by the Federal Respondents deprive Western of its discretion to exempt allocations from withdrawals (Pet. App. 31a and 33a).

utmost importance that the appellate court's decision be reviewed to remove the cloud on all allocations of the preference customers.

Beyond that, this case also merits review by the Supreme Court for the appellate court's violation of Rule 52(a) (Pet. 7-8), which permits a grievous breach of contract by a Government agency. Also, the appellate court's violation of Rule 52(a) signals a need for re-emphasis of the importance of adherence to the strictures of Rule 52(a) as enunciated by this Court.

In arguing against certiorari (Br. 9) the Federal Respondents ignore this Court's admonition in *Anderson v. Bessemer City*, 470 U.S. 564, 84 L.Ed.2d 518 (1985), that the question is not whether an appellate court's findings of fact (the appellate court did make findings of fact in support of its interpretation) are "clearly erroneous" (as they are and as are its legal conclusions) but, rather, whether the *district court's findings of fact are clearly erroneous.* 470 U.S. 577, 84 L.Ed.2d at 530.

The Federal Respondents also ignore that while the appellate court ruled that "nonwithdrawable" was ambiguous, it recognized at the same time that although interpretation of a contract under California law is a question of law, the interpretation involves "a complex interplay of questions of fact and questions of law" and that the trial court's findings of fact themselves involved in that "complex interplay" are reviewed under the "clearly erroneous standard" (Pet. App. at 9a).

While declaring "nonwithdrawable" ambiguous (which ambiguity required consideration of extrinsic evidence, and, affirmance of the district court's decision), the appellate court did not rule on the district court's findings of fact upon which its conclusions of law rested. The appellate court's opinion is silent as to any erroneous (clear or otherwise) findings of the district court, other than to boldly

declare "nonwithdrawable" as ambiguous.[3] Given this, how the Federal Respondents can assert that this case does not present an issue regarding the necessity of appellate court's to comply with the strictures of Rule 52(a), defies understanding.

Moreover, on the basis of the evidentiary record, the district court's findings of fact on which it based rejection of Western's contention that "nonwithdrawable" was a "term of art", the district court's conclusions are correct, are not erroneous, and should have been affirmed. The district court's determinations include that if the use of "nonwithdrawable" were ambiguous, under California law the interpretation goes against the party responsible for the ambiguity, namely, Western, which responsibility Mr. Hine, its witness and General Counsel, acknowledged (RT 15, 16, 7/20/90).

The Federal Respondents assert, in defense of the appellate court's concentration on the 1967 amendments to the exclusion of the district court's findings and conclusions relating to the basic affirmative positions advanced by Western in support of its position on the meaning of "nonwithdrawal", that the "parties agreed that the meaning of the term 'nonwithdrawable' should be resolved by reference to the 1967 amendments", citing to a sentence from the district court's decision about both parties "relying" on their respective interpretations of the amendments (Pet. App. 25a). Petitioners did rely on the 1967 amendments, regarding them as important evidence that "nonwithdrawable" meant not subject to withdrawal for any reason. But

---

[3] Federal Respondents admit that the district court did not mention two findings of the district court addressing the meaning of "nonwithdrawable" as used in the settlement agreement, having ruled that the meaning of the 1967 amendments was inconclusive (Br. 9-10, n. 9). Federal Respondents assert that "[t]here is no indication that the court of appeals failed to weigh properly these factual conclusions." (Br. 10, n. 9). This declaration of faith does not overcome the fact that the appellate court focused solely on the 1967 amendments. Declaring "nonwithdrawable" ambiguous it ignored the district court's findings of fact and conclusions therefrom.

Petitioners' did not rely on the 1967 amendments to the exclusion of all else. Had Petitioners relied solely on the 1967 amendments, there would not be the evidence on which the district court's findings of fact and conclusions of law rest.

ARGUMENT

I.

The Federal Respondents would have this Court believe that "nonwithdrawable" was in use since 1963 to describe allocations in fact subject to withdrawal such as Cities' 1963 allocations, which were subject to withdrawal for project use and the first preference of Trinity County, by describing Cities' 1963 allocations as "long-term nonwithdrawable" allocations (Br. 2, 3, n. 2). The record shows, and the district court found, which finding is unchallenged, that "nonwithdrawable" was never used to describe the contracts or allocations. The Federal Respondents would also have the Court believe that "nonwithdrawable" was used by Santa Clara in its complaint in its 1975 lawsuit. Santa Clara did not use that term (P.Ex. 17). Western used that term in response to the complaint as meaning "firm" and the Ninth Circuit in *Andrus* (*Santa Clara v. Andrus*, 572 F.2d 660), adopting Western's definition of the term, also used it as meaning "firm" (572 F.2d at 663; RT 177, 7/23/90). The appellate court in this case concedes (Pet. App. 6a) that the Santa Clara litigation did not use "nonwithdrawable" as meaning subject to withdrawal for the three purposes.

Next, Federal Respondents state that non-parties to the settlement agreement would bear the entire burden of withdrawals if Cities' position were upheld (Br. 4, n. 3). This is also misleading. Three other contracts are not subject to withdrawal for any reason (SMUD's 290 MW; Arvin Edison's allocation, Reclamation 2035's contract); SMUD's 70 MW, and all other allocations are exempt from withdrawals for Calaveras and Tuolumne Counties (RT 129-131, 134-135, 7/19/90; 1-3, 7/20/90; 20 7/23/90; 296, 318, 7/24/90; P.Exs. 26 (Vols. I and II); 33, p. 33319, RT 287; 36; 38; 51).

Federal Respondents also state, without citation to the record, that the parties "agreed" that the settlement preserved the kind of allocation that Cities had at the time of the settlement. There was no such "agreement", or even "suggestion" (Br. 11). Nor did Cities and the district court concentrate solely on the 1967 amendments (Br. 5) as the evidentiary record and the district court's decision show.

Finally, the Federal Respondents imply that the district court's findings that the 1967 amendments are "reasonably subject to both interpretations" and that "the extrinsic evidence regarding the [the nature of] the 1967 amendments" is inconclusive with respect to withdrawals, are in conflict with the district court holding that " 'nonwithdrawable' clearly and unequivocally meant" not subject to withdrawal for any reason (Br. 5-6). There is no conflict. The district court's findings and conclusions based on the evidence which rejected Western's affirmative positions in support of its interpretation, such as that the word was a "term of art" meaning subject to withdrawal for the three stated purposes, are supported by the evidence.

II.

The Federal Respondents explain the appellate court's disregard of any extrinsic evidence relating to the 1967 amendments on the ground that the appellate court found the provisions to be unambiguous (Br. 11). Federal Respondents apparently have overlooked, or refuse to credit, the appellate court's statement that "(t)here is no relevant extrinsic evidence in the record that could alter the meaning of the 1967 amendments." (Pet. App. 13a). In pages 13 to 24 of the Petition, petitioners show that the extrinsic evidence with respect to the 1967 amendments does contradict the appellate court's interpretation and does so overwhelmingly.

Cities find it impossible to believe that the appellate court, to single out only one contradictory piece of evidence, did not consider the exchange of correspondence between the Regional Director of the Sacramento Office of the Bureau

and the Bureau's Commissioner in Washington regarding the establishment of procedures for withdrawal of "short term" allocations as not contradicting its interpretation of the 1967 amendments[4] (P.Exs. 39, 40, 41).

Palo Alto (in 1966) and Plumas Sierra (in 1965) sought and received short term allocations of 11 MW and 2 MW, respectively, to meet their load growth requirements, pending consummation of the agreement between the load growth customers (Cities & Shasta) and Bureau relating to its commitment, made in 1964, and memorialized in the 1967 amendments, to provide their load growth. The Regional Director in his 1966 letter proposed the establishment of a priority system under which Palo Alto and Plumas would be the last to be withdrawn because:

> "As it was intended to carry the load growth of these customers as a result of the additional power made available to Central Valley Project from the Intertie, we recommend these allocations . . . be preserved to the maximum extent possible."

The Commissioner, in a 1966 response, deferred the establishment of withdrawal procedures until some variables were resolved and the situation stabilized. In 1968, *subsequent to the 1967 amendments*, the Regional Director revived the subject. Referring to the earlier exchange (P.Exs. 39, 40), he noted that since 1966 a new contract with PG&E has been signed (Contract 2948A, in 1967, P.Ex. 42) and that some of the variables had been resolved. Listing Cities' and Shasta's current contract rates of delivery, he noted that

---

[4] The Federal Respondents state (Br. 11) "that the court of appeals held that the 1967 amendments unambiguously used the term 'nonwithdrawable' to subject allocations for the three stated purposes" to withdrawal, citing Pet. App. at 13a. The appellate court did not hold that the 1967 amendments used "nonwithdrawable". Pet. App. 13a, refers to its opinion where it quotes the provisions of the 1967 amendments. The word "nonwithdrawable" or any form of that word, does not appear, nor does "withdrawable" or any form of that word. What does appear in a footnote is only "curtailment", which is not synonymous with "nonwithdrawable" and does not have the same practical effect as mistakenly claimed by the appellate court (Pet. App. 13a, n.4; Pet. 18-21).

amendments to existing contracts of these customers, except for Shasta, had been signed (the 1967 amendments). He continues:

> "These amendments include a commitment by the United States to serve the load growth of each of these customers to the level which each reaches in 1980 or to a pro rata share of the total available if all customers exceed 1,050 megawatts of maximum simultaneous demand. *This commitment would exclude those above-mentioned municipalities and cooperatives from any procedures established for withdrawal of short term power.*" (p. 2; emphasis supplied)

He proposed a new withdrawal procedure in which—

> "all our preference customers, *with the exception of the municipalities and cooperative mentioned earlier*, be subject to withdrawal based on a pro rata percent reduction of the individual withdrawable allocations." (emphasis supplied).

Here is the Regional Director in whose office the 1967 Amendments were prepared (RT 16, 7/23/90, Western Witness Hood), in a contemporaneous interpretation—unrelated to the existence of any controversy regarding the meaning of the 1967 amendments—recognizing that the commitment to provide the load growth of Cities means that the load growth customer's allocations are exempt from withdrawal so that their "short term" allocations, which were subject to withdrawal because made from power previously allocated to other preference customers but unused, would now not be subject to withdrawal, having been converted to "nonwithdrawable" status by the 1967 amendments.

Western witness Magaw testified on cross-examination with respect to Palo Alto's and Plumas Sierra's "short term" allocations that they were "subsumed within their load growth amendments made subsequent to that" (RT 285, 7/24/90). Asked to explain "subsumed", he explained (id.) "if they had withdrawable allocation at the time, and subsequent to that they were given load growth allocations

which were firm, depending on their load growth at the time, my feeling would be that they were no longer withdrawable and therefore subsumed to the load growth contract." In short, the allocations of the "load growth" Cities, by reason of the commitment to provide their load growth, reflected in the 1967 amendments, were not subject to withdrawal, as Petitioners have contended. The appellate court's interpretation is wrong.

The Federal Respondents assert that "curtailment" does not have the "constricted" meaning imputed to it by Cities, because Article 7(b) of the 1967 amendments "refers to *curtailment* of CRD for the three stated purposes, while the very next paragraph, Paragraph 7(c), promises the customer 90 days' advance notice of the '*curtailment*' of its CRD and permits the customer, in response, to terminate the contract." (Br. 13-14; emphasis supplied). How that either shows that "withdrawal" for the three stated purposes are authorized or that "curtailment" does not mean a temporary *pro rata* reduction of deliveries, or shows that "curtailment" means "withdrawable" escapes Petitioners. The Federal Respondents offer no explanation and they cannot.

Article 9(b) (Pet. App. 46a-47a) defines "total power and energy available" to serve Cities. The definition does not include power for project use and the first preference of each of the three counties. Since the power for the preference entities in the three counties are not included, it follows, as night follows day, that curtailment of the "total power and energy" due to a shortage, does not involve any power of the preference customers in the three counties. The provision described by the appellate court as "a straightforward recital of the three [two] stated purposes" is just that (material in brackets supplied). It does not authorize "withdrawals", assuming, *arguendo*, "withdrawal" is "curtailment". The appellate court's second guessing of the district court on the meaning of the 1967 amendments missed the mark.[5]

---

[5] Note that the Federal Respondents nowhere in their brief in oppo-

Furthermore, the evidence shows Western serves the first preference customers from capacity available under the 1152 load level, namely, from the 102 MW increase in Pacific Gas and Electric's ("PG&E") support obligation under Contract 2948A (P.Ex. 33, p. 33315, RT 283) and not from power at the 1050 MW level. Western withdraws power to serve the first preference customers in Calaveras and Tuolumne Counties only "as a result of an 1,152 load level withdrawal". (P.Ex 33, p. 33316, RT 281). In 1967 when the load growth amendments were made there was no additional 102 MW and a 1152 load level. The maximum load level for Cities is 1050 MW. It is from that load level that Cities are served. This is an example of another contradiction of the appellate court's interpretation of the 1967 amendments by extrinsic evidence.

The Federal Respondents in attempting to avoid the consequence of Paragraph K of the General Power Contract Provisions which explicitly provides that "curtailments" shall not be deemed "withdrawals", actually concede that "curtailments" are not "withdrawals". Respondents argue (Br. 14) the "curtailment of service . . . of temporary interruptions to electric service . . . because of conditions on the power systems of the United States that Paragraph K deals with "are not the predicted *curtailments* of CRD for the three stated purposes in Article 7(b) and (c)." Respondents say that the proviso that warns that "curtailments" shall not be deemed "withdrawals" means there are provisions in the contracts that authorize withdrawals, otherwise, there was no need to *distinguish* "curtailments from withdrawals". Thus, Respondents concede that "curtailments" are not "withdrawals" and that the use of these different terms,

---

sition defend the court's erroneous interpretation of the sentence (Pet. App. 12a) that merely states Western's obligation under the 1967 amendments to provide Cities' load growth as a provision authorizing withdrawals for load level protection. They also ignore Cities' showing that the same provision relied on by the appellate court appears in 20 contracts. That the contracts include express provisions for withdrawals for project use and Trinity County. If the provision relied on by the appellate court were authority for withdrawal, the express provisions would not be there (Pet. 21-23).

with their difference consequences (curtailments are temporary; withdrawals are permanent), is not an inadvertence (Pet. 21-23). Finally, this analysis by the Federal Respondents assumes every contract has withdrawal provisions, but, as shown, that is indisputably not the case, and Paragraph K is in each contract.

III.

Finally, addressing Cities' arguments that the appellate court's decision deprives Cities of the only benefit of the settlement, i.e., a specific allocation of power to each of Cities, the Federal Respondents say that "Cities *now* acknowledge that it was advantageous for them to be assigned a specific maximum allocation in the MOU." (emphasis supplied.) The benefit of specific allocations for each of Cities had been explicitly expressed by Cities during the settlement negotiations. It was the *raison d'etre* for Cities relinquishment of the valuable 65 MW to Santa Clara. This has been Cities' constant position. The specific allocations were its only benefit of which it is deprived.

The Federal Respondents do not challenge, and cannot challenge, Cities' showing that the other benefits to Cities of the settlement erroneously claimed by the appellate court are non-existent, such as the legally absurd claim that Western could have taken away all of the Cities' allocations, based upon the appellate court's misinterpretation of the *Andrus* decision.

CONCLUSION

Petitioners in this reply brief have been able to bring into sharper focus the grievous wrong that has been done to Petitioners by the appellate court's erroneous second guessing, and the persistence with which Western, the principal Respondent, seeks to preserve a decision of the appellate court which is demonstrably wrong, violates Rule 52(a), and is in conflict with decisions of the panel's own Circuit and of this Court.Petitioners submit that this case is a certiorari worthy case and that summary reversal of the appellate court is appropriate.

Respectfully submitted,

REUBEN GOLDBERG*
CHANNING D. STROTHER, JR.
GOLDBERG, FIELDMAN & LETHAM, P.C.
1100 Fifteenth Street, N.W.
Washington, D.C. 20005
Telephone (202) 463-8300

ARIEL PIERRE CALONNE
City Attorney
City of Palo Alto
250 Hamilton Avenue
Palo Alto, CA 94301
Telephone (415) 329-2171

Attorneys for Petitioners
Palo Alto, Roseville, Redding
Biggs, Gridley and Plumas Sierra
Rural Electric Cooperative

**Counsel of Record*

MICHAEL F. DEAN
City Attorney
City of Roseville
311 Vernon Street
Roseville, CA 95678
Telephone (916) 781-0325

Attorney for Petitioner
City of Roseville

RANDALL A. HAYS
City Attorney
City of Redding
760 Parkview Avenue
Redding, CA 96001-3396
Telephone (916) 225-4050

Attorney for Petitioner
City of Redding